Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of **Distribution of the 2004 and 2005 Cable Royalty Funds**	**Docket No. 2007-3 CRB CD 2004-2005**

REBUTTAL TESTIMONY OF EDWIN S. DESSER

December 11, 2009

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1. I am submitting this testimony to the Copyright Royalty Judges on behalf of the Joint Sports Claimants (JSC). My testimony is in response to testimony provided by Dr. George S. Ford in connection with the 2004-2005 Cable Royalty Distribution Proceedings.

Qualifications

2. I am the founder and President of Desser Sports Media, Inc (DSM). My curriculum vitae is attached as Appendix A. DSM specializes in consulting for the sports media community. Since 2005, DSM has provided numerous valuation analyses of media rights, and participated in the negotiation of billions of dollars in media rights agreements. Clients include major league teams, leagues, federations and associations, as well as distributors, start-up, and technology companies. DSM has created business plans for new networks, assessed the ability of sports programming to drive adoption of new technology platforms, valued cable networks, advised potential purchasers of networks and teams, and has provided litigation/arbitration support.

3. Prior to starting DSM, I spent 23 years in senior management positions in the Commissioner's Office at the National Basketball Association in New York City. Positions included President, NBA Television & New Media Ventures, EVP, Strategic Planning and Business Development, VP/General Manager, NBA Entertainment, Inc., and Director of Broadcasting & Executive Producer. I was primarily responsible for the valuation and negotiation of the league's media rights agreement with various cable and

broadcast networks, including TNT, as well as arrangements with most major cable MSOs and all satellite operators (DirecTV, PrimeStar and Echostar).

Discussion

4. I understand that the purpose of these proceedings is to determine the distribution of compulsory licensing royalties that have been paid by cable operators for the right to distribute non-network programming via distant signals during the 2004-2005 time-period.

5. I have reviewed the Testimony of Dr. George S. Ford in which he describes a model he created to estimate the relative value of the compensable programming carried on distant signals. I have also reviewed the Rebuttal Testimony of James Trautman in which, among other things, he shows how Ford's model would apply to the programming actually carried by the cable network TNT. Trautman shows how, if Ford's model were applied to TNT, it would have very significantly underestimated the relative value of the sports programming on TNT in contrast to the other types of programming TNT purchased. Indeed, Trautman reports that contrary to the 7 to 8 percent of value Ford's approach would attribute to JSC programming on TNT, the actual cost of that programming was at least 45 to 46 percent of TNT's total programming cost. *See* Trautman Rebuttal Testimony at 6-7.

6. That JSC programming might have a low share of the overall program time on TNT or of the relative amount of time households spend viewing all the TNT programming -- but nonetheless represent a very high relative cost compared to other TNT programming -- is consistent with my experience in the sports media business. Indeed, I was responsible for negotiating the NBA's contract in effect at that time with

TNT. I know from personal experience that applying Ford's model to TNT would show, as Trautman illustrates, that Ford's model significantly underestimates the relative value of sports programming in the real world.

7. Ford's model is based on a measure of relative advertising cost that he has created for this proceeding. While advertising is certainly a part of the economics of cable programming, it represents only a minority of the revenue picture and therefore of potential programming expenditures. Cable systems generate the bulk of their revenue through subscriptions -- something for which Dr. Ford's model does not account.

8. In addition, Ford's model does not account for other types of value attributable to sports programming in my experience. These additional "elements of value" include promotional value, halo effect/prestige, packaging, audience flow, risk, differentiation, driving distribution, and the unique differentiated characteristics of sports programming, among others. This is why sports are often a "loss leader" for a network.

9. Sports are highly promotable. Sports leagues and teams are well known, much beloved brands, and "household names," which have been built over generations. The names and logo are instantly recognizable, and thereby efficient to use to promote tune-in and association, because they stand out and grab attention.

10. There is considerable prestige that comes from a sports association. This is sometimes known as the "halo effect." It is experienced by networks, sponsors, and distributors. Sports fans' affection for their sports can rub off on those who are associated. This branding is an important element of the value of sports television, and is ignored in the Ford analysis.

11. Even though the Ford analysis purports to measure a program's advertising value, it fails to account for the fact that sports programming is frequently used by networks and distributors as a "hook" to help to sell packages of advertising in multiple programs. Networks might package commercial time in a sports event, with advertising in adjacent programming, and other programming on the network or cable system. Even if the allocated portion of the package price of the sports programming is higher than the entertainment programming or news programming that might be in the package, this does not account for the fact that absent the sports element, that particular spot or series of spots in the entertainment programming might not have sold at all, or might have to be sold for a lower price if not included in such a package. Thus, the true financial value of sports advertising is typically understated.

12. Sports is often used by programmers as a schedule "tent pole" to attract viewers, and then to cycle them into other programs that are either promoted in the sports event, or which preceded or follow it. In this way, value created by the presence of the sports programming is reflected in the sales of other programming.

13. Like most other businesses, risk is an element of the TV programming business equation. Many shows are developed, yet most fail. A handful survive, and fewer still become hits. Sports is different. Even though a particular team's success ebbs and flows over time, sports TV programming overall is remarkably consistent and predictable in performance. As a result, there is less risk associated with sports than many other forms of entertainment programming. This track record for success enhances its relative value compared with alternative programming, even though this fact is not reflected in the Ford model.

14. One of the biggest sports programming value stores is in the leverage key sports programming networks can exert in support of the carriage of new non-sports programming networks. Major entertainment companies that control the distribution of key sports programming networks are able to leverage the affiliation negotiation of the sports network into the new or improved carriage of a sister or unrelated, co-owned cable network. This process obscures the true value of the sports network and its programming, concealing it as the creation of new or increased enterprise value for the alternate network.

15. Sports packages are also used to drive penetration of programming networks. The Fox Television Network was launched harnessing the NFL Sunday afternoon package. The NFL and NBA were used to successfully launch TNT, widely considered one of the most successful network launches in cable TV history. Superstation penetration was driven by the presence of the MLB Atlanta Braves and NBA Hawks games on WTBS and the Chicago Cubs, White Sox and Bulls on WGN.

16. Finally, some sports packages are able to influence the selection of particular multi-video providers by consumers, utterly unrelated to any advertising that might be contained. The NFL's Sunday Ticket package, long a fixture on DIRECTV has aided the growth of this platform against cable. The same is true of the NCAA's Mega March Madness package. The cable industry was recently outbid by DIRECTV for the NASCAR multi-car camera package in order to further improve its competitive position. Each of these are examples of the unique power and value of sports programming in the cable industry, completely ignored by the Ford analysis.

17. Unlike entertainment, which is often exhibited in multiple windows over an extended period, often all at the same time (e.g., syndicated and off-network episodes all run while first run episodes air on broadcast networks), sports is typically shown on an exclusive basis. A particular game or feed is only seen on one channel, typically on a live basis, and then never again. While it is true that some games are shown on dual networks (e.g., regionally and nationally) and are also sometimes repeated, the vast majority of games are exclusive to one network and air only once. This makes each one that much more compelling.

18. Because it is compelling and topical, sports is typically consumed live, and not TIVO'ed, or downloaded to be seen later. In contrast, entertainment programming is not only available on a first run basis, but then also in re-runs, syndication, cable network runs, and via web site streaming, iTunes downloads, and DVDs. Because such programming is often viewed on a delayed or recorded basis, subscribers can "fast forward" through the commercials without stopping to watch the ads. Ford's analysis in no way addresses this growing phenomenon which disproportionately affects the programming offered by the Program Suppliers.

19. Sports is often viewed in groups, such as in bars, restaurants, airports, college dorms, health clubs, typically unmeasured by Nielsen, and therefore not truly reflected in the Ford analysis.

Conclusion

As shown in the data offered by Trautman, Ford's analysis does not provide a reliable means of estimating the relative value of sports programming vis-à-vis other types of programming, and that conclusion is particularly true for syndicated programming that falls within the claim of the Program Suppliers. My testimony is intended to identify those factors that help explain why that is the case.

APPENDIX A

ED DESSER

Ed Desser is President of Desser Sports Media, Inc., a consulting firm serving the strategic media business needs of the sports television industry. The company was founded in 2005, following Mr. Desser's more than 30-year career in sports media and radio and television. Its clients include the National Basketball Association, Detroit Pistons, Los Angeles Lakers, Anschutz Entertainment Group (AEG), Houston Astros & Rockets, Minnesota Timberwolves, Atlanta Hawks & Thrashers, Tampa Bay Lightning, Washington Nationals, Dallas Mavericks, Phoenix Suns, San Antonio Spurs, United Football League, Sacramento Kings and Monarchs, Miami Heat, LA Clippers, Portland Trailblazers, Maple Leaf Sports & Entertainment (Maple Leafs, Raptors, and Toronto FC), McKinsey & Co., Milwaukee Bucks, Oklahoma City Thunder, Qualcomm/Media Flo, Utah Jazz, DIRECTV, Chivas USA, the Professional Rodeo Cowboys Association, and the California Interscholastic Federation.

Mr. Desser's was educated at the University of California, Los Angeles, where he earned a Bachelors' of Arts in Economics. He also earned a Masters of Business Administration degree in Marketing from the University of Southern California.

Mr. Desser's professional career began in Southern California, serving in a variety of functions for several local broadcast stations. In 1977, he became Executive Producer of the Los Angeles Lakers Radio Network, and in 1978, was hired by California Sports, Inc, owner of the Los Angeles Lakers, Kings, and Forum where he became it's Director of Broadcasting and Executive Producer. He was responsible for broadcast operations, scheduling, production, transmission, and negotiating its media relationships.

In 1982, Mr. Desser relocated to New York, beginning a 23-year run with the National Basketball Association Commissioner's Office. He first became the NBA's Director of Broadcasting and Executive Producer. Responsibilities included national network contract administration, scheduling, negotiations, policy planning, and development of production and arena standards.

In 1984, he added the responsibilities of VP/General Manager, NBA Entertainment, Inc. the league's TV production and distribution arm. NBAE produces a number of programs for national and international distribution including ABC's NBA Inside Stuff, NBA Action, NBA Match-up, and Vintage NBA. NBAE also produces the nightly highlights and news programming for NBA TV and NBA.com.

In 1987, Mr. Desser was also named VP/Television for NBA International. This division was responsible for growing the distribution of NBA programming to more than 9000 hours in 200 countries worldwide, and production of world feeds of NBA and other major international sports events.

In 1990, the NBA began its quest to develop new media opportunities, naming Mr. Desser President of NBA Television and New Media Ventures, later renamed NBA New Media and Strategic Initiatives. Over the ensuing decade, he spearheaded the exploration and business development for the league of a variety of new technologies ranging from High definition TV (first used for the NBA All Star Game in 1991), Direct Broadcast Satellite (1994), the Internet and NBA.com (1995), NBA TV, (1999), and Satellite Radio (2002). Many of these projects established the framework utilized by most major North American sports leagues, including the NBA's agreements with MVPD's to distribute "out of market" game telecasts (NBA League Pass).

During this period of dramatic technological growth, Mr. Desser was also instrumental in the negotiation of the NBA's landmark national television agreements with NBC, Turner Broadcasting, ABC, and ESPN, which resulted in revenue growth of more than 12 fold, and substantially increased coverage and distribution. He established NBA TV, the first network devoted to a major US sports league, including handling affiliation negotiations with all major MVPDs. He led the NBA's annual business planning process, and was a staff member of the NBA Board of Governor's Planning Committee.

During his NBA career, Mr. Desser also assisted many teams negotiate their local rights agreements. When he returned to California, after the NBA, he formed Desser Sports Media, Inc. in order to continue providing this service, to a vast array of clients across the sports industry. Key projects have included creation of business plans for new regional TV networks, valuation and negotiations of key media agreements, strategic planning, and the balancing of new media with traditional distribution platforms in order to generate maximum current and future revenues. The existence of Comcast Sports Net West, Comcast Sports Net Northwest, and Fox Sports Oklahoma Regional Sports Networks are direct results of this work.

Today, Mr. Desser resides in Santa Monica, California with his wife, Eydie Eisen Desser.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 12/11/09

Edwin S. Desser

Certificate of Service

I hereby certify that on Monday, February 12, 2018 I provided a true and correct copy of the Edwin Desser Written Direct Testimony (JSC Written Rebuttal Statement Vol. II) to the following:

Canadian Claimants Group, represented by Lawrence K Satterfield served via Electronic Service at lksatterfield@satterfield-pllc.com

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Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

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Signed: /s/ Michael E Kientzle